No. 16179

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

DAN T. KENNEDY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINIONS BELOW

The original decision of the district court is reported at 160 F. Supp. 30. The decision of the district court on the motion of the United States to reconsider is reported at 162 F. Supp. 939.

JURISDICTION

This is an appeal from the final order of the district court which dismissed the complaint of the United States in a condemnation proceeding entered on June 25, 1958 (R. 60–61). Notice of appeal was filed on August 8, 1958. The jurisdiction of the district court over the condemnation proceedings rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether Chapter VII of the Act of September 6, 1950, 64 Stat. 595, 679, appropriating funds for the National Park Service of the Department of the Interior, authorized the acquisition of appellee's land within the established boundaries of Mount McKinley National Park, Alaska, and, if so,

2. Whether such acquisition could be accomplished by condemnation.

STATUTES INVOLVED

The relevant portion of the Act of June 25, 1948, 62 Stat. 869, 986, provides as follows:

> SEC. 6. Section 1 of the Act approved August 1, 1888 (chapter 728, 25 Stat. 357, 40 U.S.C., sec. 257) is amended to read as follows:
>
> "That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this Act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice."

The relevant portion of the Act of September 6, 1950, 64 Stat. 595, 692, provides as follows:

CONSTRUCTION

For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of roads, trails, parkways, buildings, utilities, and other physical facilities; and the acquisition of lands, interests therein, improvements, and water rights; to remain available until expended, $19,667,000, of which not to exceed $7,935,000 is for liquidation of obligations incurred pursuant to authority granted under the heads "Independence National Historical Park, Pennsylvania", Parkways, National Park Service," and "Roads and Trails, National Park Service", in the Interior Department Appropriation Act, 1950: *Provided,* That the unexpended balances of prior year appropriations, including unused balances of related contract authorizations, for the foregoing purposes, shall be transferred to and merged with this appropriation: *Provided further,* That not to exceed $150,000 of the funds available for the Independence National Historical Park, Pennsylvania, shall be available after Januuary 1, 1951, for the management, protection, maintenance, and rehabilitation of Independence Hall, grounds, and structures in that Park.

STATEMENT

This action is for the taking under the power of eminent domain of two tracts of land within the exterior boundaries of Mount McKinley National Park in Nenana Recording Precinct, Fourth Judicial Division, Alaska. The complaint was filed in September 1951 (R. 3–5). By answer filed in November

1951 appellee Kennedy objected to the taking of Tract A, containing five acres. Tract B, containing 35 acres, has been acquired by the United States pursuant to a stipulation and judgment entered in February 1956 by the district court in the Fourth Judicial Division (R. 20–25). Allegations of the answer as to lack of necessity for the taking were stricken on motion (R. 11–12). The case was transferred in November 1956 for trial from the Fourth to the Third Judicial Division at the request of Mr. Kennedy (R. 26–27). It came on for trial in December 1957.

Prior to the empaneling of the jury, appellee raised the question whether there was statutory authority under which the Secretary of the Interior could condemn land in Mount McKinley National Park.[1] The parties thereafter briefed this issue for the district court. At the same time the United States filed an amended complaint. The changes were to show specifically that the Solicitor of the Department of the Interior had authority to cause initiation of the condemnation proceeding and that the proposed use was necessary and advantageous to the United States (R. 3–5; 30–37). Both the original and amended complaints cited as authority for the taking the Act of August 1, 1888, 62 Stat. 986, as amended,

[1] Since the question whether this alleged objection came too late was not raised in the trial court, we do not discuss the issue whether the denials of the answer for lack of information (R. 7–10) constitute sufficient assertion of appellee's "objections and defenses to the taking of his property" within the meaning of Rule 71A(e), F.R. Civ. P., so as to escape the following provision that "A defendant waives all defenses and objections not so presented."

40 U.S.C. sec. 257, and Chapter VII of the Act of September 6, 1950, 64 Stat. 595, 679. The latter act made appropriations for the Department of the Interior for the fiscal year 1951. The particular item with which this case is concerned is found at 64 Stat. 692. The item is entitled "Construction" under "National Park Service" and insofar as pertinent states:

> For construction and improvement * * * of roads, trails, parkways, buildings, utilities, and other physical facilities; and *the acquisition of lands, interests therein, improvements, and water rights;* to remain available until expended, $19,667,000 * * *.[2]

The court, on March 6, 1958, rendered a written opinion in which it granted the motion to dismiss on the ground that it was unable to find that the general appropriation act relating to all of the national parks could be construed to authorize condemnation proceedings in this instance. 160 F. Supp. 30. The United States filed a motion to reconsider, which was granted, and the court considered the matter anew upon briefs submitted by both parties. The court filed a supplemental opinion on June 13, 1958, reaffirming its former opinion finding that Congress had not, either expressly or by clear intendment, authorized the condemnation of land within the Park area here involved. 162 F. Supp. 939. This appeal followed.

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[2] Emphasis supplied by appellant throughout this brief unless otherwise noted.

SUMMARY OF ARGUMENT

The complaint in condemnation was dismissed for failure to state a cause of action. Such procedure admits all well-pleaded averments. It leaves for the consideration of this Court only the questions of whether as a matter of law an appropriation act authorizing the acquisition of land and 40 U.S.C. sec. 257, which grants authority to condemn whenever an officer of the Government has been authoried to procure land, may be the basis of a condemnation proceeding and whether the appropriation act used in this case provided for the acquisition of appellee's land. Other questions of fact which might be placed in issue, such as the amount of just compensation, cannot be raised in this appeal.

I

This Court's decision in *Polson Logging Co.* v. *United States,* 160 F. 2d 712 (1947), and many other cases of the Supreme Court and other Circuits make it now well settled that the Government's power to condemn is coextensive with its power to purchase. It is further generally recognized that statutory authorization to procure real estate may be evidenced by the making of an appropriation as well as a specific authorization to acquire. Thus, the appropriation act and 40 U.S.C. sec. 257 have in many cases provided the basis for a condemnation action.

It is true that the particular facts vary from case to case. But in all cases where an appropriation act and 40 U.S.C. sec. 257 furnished the basis of condemnation, it is purely a matter of degree of discre-

tion in choosing the land to be taken. For some national parks there is a specific provision in the statute creating the park giving the power of condemnation. But the fact that there are alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Government must rely on that authority alone. The section of the act creating Mount McKinley National Park, which preserves the rights of homesteaders and other claimants, is not a limitation upon the power of the United States to condemn land.

II

The legislative history of the 1951 appropriation act for the National Park Service shows that the fund used in this case was for the acquisition of privately owned lands within the authorized boundaries of established national park areas. It was a flexible fund to be used to acquire land whenever it was advantageous to the Government to do so. The fund was available for the acquisition of land within any of the national park areas. It could not be said in advance which of the 714,000 acres of privately owned lands within the system would be acquired with this fund. The fund was to be spent where the land could be acquired at bargain prices, where there was a danger of the tracts being commercially developed adverse to the best interests of the park, or where the tracts stood in the way of development or proper use of the park area.

The only possible interpretation of the lower court's holding, consistent with its acknowledgement that

officers of the Government can condemn any land Congress has authorized them to procure, is that land could not be purchased or otherwise acquired in any national park save where there is express authority in the act establishing the park or the park is named in the appropriation act. Yet in the legislative history of this very appropriation, there are given at least seven instances where this same type of fund in prior years has been used to acquire land in park areas where there was neither express authority in the creating act nor specific designation of the park in the appropriation act. Further, in this very condemnation case a consent judgment was entered by which the United States has acquired 35 acres. The fact that it was a consent judgment is immaterial because under 41 U.S.C. sec. 14 no land may be acquired on account of the United States except under a law authorizing such purchase. The only place where such authority to purchase can be found for the consent judgment is in the 1951 appropriation for the National Park Service. Further, Congress made the 1951 appropriation without naming any specific parks where this general acquisition fund was to be used, although in the hearings Congress was advised that it was planned to use this fund to acquire land in parks where no authorization to acquire existed unless the appropriation itself provided it.

ARGUMENT

The basis which the district court had for dismissing the complaint was the lack of statutory authority to condemn. The district court believed

that Congress had not intended to permit the taking of privately-owned land in Mount McKinley National Park by eminent domain. 162 F. Supp. 939, 941–942. The error in the district court's reasoning arises from a misconception of the nature and effect of authority granted by the appropriation act, 64 Stat. 595, 692, the statute establishing Mount McKinley National Park, 16 U.S.C. secs. 347–355a, 39 Stat. 938, as amended, and the statutes establishing the National Park Service, 39 Stat. 535, as amended and supplemented, 16 U.S.C. secs. 1–18f. These acts of Congress provide the basis on which land could be *acquired* or *procured* within the boundaries of Mount McKinley National Park. Who would argue, indeed, that the United States did not have authority under the appropriation act to buy land in Mount McKinley National Park if somebody wanted to sell it to them? The district court vigorously denied that it had overlooked the fact that the Act of August 1, 1888, 40 U.S.C. sec. 257, contains a general grant of power to condemn property when officers of the Federal Government are authorized by Congress to procure it. 162 F. Supp. 939, 941. The district court therefore erred when it held the appropriation act and 40 U.S.C. sec. 257 were no statutory authority to condemn land in this case.

The above summarizes the sole question raised on this appeal. True, there are other questions which might be placed in issue, and the usual determination of just compensation for the land is still to be settled. But the district court disposed of the case by granting a motion to dismiss for failure to state a cause

of action. As the district court correctly recognized this procedure admitted all well-pleaded averments in the complaint. 160 F. Supp. 32. The procedure accordingly placed beyond dispute for present purposes all material allegations of the complaint. *Olan Mills Inc.* v. *Enterprise Publishing Co.,* 210 F. 2d 895, 897 (C.A. 5, 1954); Moore's Federal Practice (2d Ed.), Section 12.08.

We now proceed to discuss the question of authority granted by Congress to take the Kennedy tract by eminent domain, the only question of law considered by the district court.

I

Under the Act of August 1, 1888, 40 U.S.C. sec. 257, Congress has given authority to condemn any property where there is authority to purchase or otherwise acquire

The Act of August 1, 1888, sec. 1, 25 Stat. 357, as amended, 40 U.S.C. 257, provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, * * *.

The meaning of this statute is repeatedly asserted by the many judicial decisions which have invoked its provisions. No useful purpose would be served by an exhaustive explanation of these cases. This Court's decision in *Polson Logging Co.* v. *United*

States, 160 F. 2d 712 (1947), is a definitive opinion on the subject. It is now well settled under this section of the code that the Government's power to condemn is coextensive with its power to purchase. *United States ex rel. T.V.A.* v. *Welch,* 327 U.S. 546, 554 (1946); *Hanson Co.* v. *United States,* 261 U.S. 581, 587 (1923); *Lewis* v. *United States,* 200 F. 2d 183, 184 (C.A. 9, 1952), cert. den. 345 U.S. 907; *United States* v. *Certain Real Estate, &c.,* 217 F. 2d 920, 925 (C.A. 6, 1954); *United States* v. *Advertising Checking Bureau,* 204 F. 2d 770, 771–772 (C.A. 7, 1953); *Barnidge* v. *United States,* 101 F. 2d 295, 297–298 (C.A. 8, 1939); *United States* v. *Threlkeld,* 72 F. 2d 464, 465 (C.A. 10, 1934), cert. den. 293 U.S. 620; *United States* v. *Beaty,* 198 Fed. 284 (W.D. Va., 1912), reversed on other grounds, *Beaty* v. *United States,* 203 Fed. 620 (C.A. 4, 1913).

The district court seemed to recognize this rule.[3] 162 F. Supp. 941. The court further recognized that an appropriation act can supply the authorization for the purchase and hence for the condemnation. This Court had perspicuously stated in *Polson Logging Co.* v. *United States, supra,* that "the statutory authorization to procure real estate may be evidenced by the making of an appropriation as well as by a specific authorization to acquire." 160 F. 2d 714. The district court repeated this language practically verbatim

[3] "Plaintiff * * * contends that the Court 'appears to have overlooked the fact that 40 U.S.C.A. Sec. 257 contains a general grant of power to officers of the Federal Government to condemn property when such officers are authorized by Congress to procure real estate.' This is an understatement for this Court certainly did not overlook such fact." 162 F. Supp. 941.

in its original opinion when discussing *United States* v. *Threlkeld, supra,* and the *Polson* case. 160 F. Supp. 33. *Seneca Nation of Indians* v. *Brucker,* 162 F. Supp. 580 (D.C. 1958), affirmed 262 F. 2d 27 (C.A. D.C., 1958), the district court interpreted as holding "that an appropriation act which appropriated money for the construction of the Allegheny Reservoir Project 'manifested a clear Congressional intention to authorize the construction of the project'; and that since the project was specifically authorized by the *appropriation,* the right to condemn land for such purpose must be upheld" (162 F. Supp. at p. 940). Similarly, the district court found *United States* v. *5,677.94 Acres of Land,* 152 F. Supp. 861 (Mont. 1957), to hold "that *an appropriation act* making specific appropriations for preconstruction work on the Yellowtail Dam, *furnishes sufficient authority* for taking of the land * * *." *Id.* The same view is expressed by the Sixth Circuit in *United States* v. *Certain Real Estate, &c., supra:* "and where no other Act of Congress vests power to condemn property for a particular purpose an applicable appropriation Act may be looked to as the source of such power." 217 F. 2d 925.

The resolution of this case in the court below should have been, therefore, simply a matter of seeing whether the appropriation was in fact available to buy land in Mount McKinley National Park. In attempting to distinguish the cases on which the Government relied, the district court did not make a direct decision on this issue. It notices differences which might be important in some respects but are not controlling in this case. But the district court over-

looked the essential similarity between the present case and *Hanson Co.* v. *United States, supra; United States* v. *Beaty, supra; United States* v. *Threlkeld, supra;* and *Polson Logging Co.* v. *United States, supra.* In all these cases the power to condemn is upheld on the basis of an appropriation act and 40 U.S.C. sec. 257. The district court pointed out that in the *Polson* and *Threlkeld* cases the Secretary of Agriculture had broad powers to construct and maintain roads for national forests. That is true, as is the fact that here the Secretary of the Interior has broad administrative powers in the national parks. 16 U.S.C. secs 1–18f. But as long as there is an appropriation act granting authority to purchase, the difference between administering national parks and national forests will not affect the validity of the power to condemn.

Nor can a fundamental difference be made between those appropriations where the specific project is mentioned and the present case where the authority to purchase is given in general terms. The district court thought that *Seneca Nation of Indians* v. *Brucker, supra,* and *United States* v. *5,677.94 Acres of Land, supra,* were distinguishable because they "deal with appropriations for a specific project." 162 F. Supp. 940. The specificity of the project varies in many cases but the differences are only matters of degree. In the *Hanson* case a specific canal, a thing then in being, was named. In the cases of *Seneca Nation of Indians* v. *Brucker* and *United States* v. *5,677.94 Acres of Land* the appropriation was for a project to be constructed after

the act was passed and doubtlessly involved some post-appropriation discretion as to exact location.[4] In the *Beaty* case there was even greater latitude, the appropriation merely calling "for the purchase of land accessible to the horse-raising section of the state of Virginia * * *." 198 Fed. 285. In the *Threlkeld* and *Polson* cases the discretion was greater still, as the appropriation was for national forests generally and could have been used to purchase property in any of them. Act of March 3, 1933, 47 Stat. 1432, 1449; Act of July 1, 1941, 55 Stat. 408, 422. Just as there is no requirement that Congress refer to particular projects in authorizing an officer to procure property or space (*United States* v. *Advertising Checking Bureau, supra; United States* v. *Certain Real Estate, &c., supra*), so there is no requirement that appropriations be broken down so that the Act gives separate treatment to particular projects. In the present case, as we shall show below, the appropriation was also available for purchase of privately owned land within the boundaries of existing national parks. Of what moment are these differences of specificity except that the statutes contain variable degrees of discretion in choosing the particular projects on which to spend the money? Certainly the authority to purchase has been bestowed in all cases, and nothing in 40 U.S.C. sec. 257 suggests the power to condemn is limited by the amount of discretion vested in the official concerned.

[4] In fact, the *Seneca Nation* appropriation statute was a lump sum of $449,000,000, of which the committee report showed $1,000,000 was allocated to the particular project in question. Act of August 26, 1957, 71 Stat. 416, 417.

We believe the district court was led astray in part at least by the somewhat overlapping statutes granting authority to condemn in some national parks. There are for some parks, as the district court pointed out, individual sections authorizing condemnation in the statute creating the park. 160 F. Supp. 32; 162 F. Supp. 941. In these parks the Secretary of the Interior can have land condemned under either the statute creating the park or 40 U.S.C. sec. 257. But the fact that the Department of the Interior has alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Department must rely on that authority alone.

This brings us to the use which the court, in its original opinion, made of the reservation of existing claims in Mount McKinley. 16 U.S.C. sec. 348. In its supplemental opinion the court admits that these provisions "may not be controlling." 162 F. Supp. 941. The Congressional purpose in reserving rights of homesteaders or other claimants is not controlling, nor is it pertinent. That Congress did not in 1917 want to destroy existing claims to land by creating the Park is unrelated to whether Congress in 1951 intended to authorize purchase of land upon payment of the fair market value as full compensation.

II

There was authority to purchase the Kennedy tract in the appropriation act

Having established (1) that any time a government officer is authorized to purchase land he may obtain

it by the power of eminent domain if necessary, (2) that the authority to procure, and hence to condemn, land may be contained in an appropriation act, and (3) that the degree of specificity in designating the land to be procured does not control where there is authority to condemn, we come to the ultimate reason why the district court erroneously believed appellee's land could not be condemned.

In its first opinion the district court concluded (160 F. Supp. 33):

> I am unable to find that the General Appropriation Act relating to all of the national parks, as to which in many cases specific authority is conferred upon the Secretary of the Interior to acquire private lands, may be construed by "necessary implication" to authorize the condemnation proceeding in this instance, especially in view of the express preservation of the rights of the holders of land by homestead within the boundaries of the Park * * *.

In summarizing its second opinion the district court revealed even more clearly the basis of its holding (162 F. Supp. 941–942):

> Finding that Congress has not either expressly or by clear intendment authorized the condemnation of land within the Park area here involved, I must adhere to my former opinion, * * *.

Since the authority to purchase is the equivalent of the power to condemn, these conclusions of the district court may be accurately paraphrased as say-

ing, "I am unable to find that the General Appropriation Act may be construed by necessary implication to authorize the *purchase of land* in this instance." Since the sole basis for the conclusion is the fact that, as to some national parks, specific condemnation authority has been given, the true holding of the court is that the appropriation, so far as acquiring lands is concerned, must be read as limited to those particular national parks. The court has thus, by negative implication, narrowed the general authority granted by the appropriation to the Secretary of the Interior as to which parks to spend the money. As we will show, this unwarranted limitation is contrary to Congressional intent, as appears from the legislative history.

Congress had appropriated a flexible fund for the acquisition of lands any place within the boundaries of established national parks for several years prior to the appropriation in question to be used at the discretion of National Park Service officials. Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 81st Cong., 2d Sess., Making Appropriations for the Department of the Interior (hereinafter referred to as Senate Hearings), 195–196, 227–228. That fund is used to acquire land when it is advantageous for the government to do so "throughout the entire [national park] system." Senate Hearings, 226. In the appropriation for the fiscal year 1951, the House committee merged what had formerly been separate items for

"acquisition of lands"[5] and "for construction of roads, trails," etc. The committee report shows that the $20,542,000 in these items included only two items for land acquisition in named projects and $2,000 for water rights. The total amount adopted by the Senate for "Construction" was reduced to $19,667,000. The Senate report on H.R. 7786 showed these differences between the two versions: the Senate decreased the sub-item "Buildings and utilities" by $150,000; the Senate decreased the sub-item "Acquisition of lands and water rights" by $1,000,000 in connection with Independence National Historical Park, Pennsylvania; but the Senate *increased* the "Acquisition of lands and water rights" sub-item by $275,000. The last increase is explained in the report as follows: "The increase of $275,000 approved by the committee is for acquisition of privately owned lands within the authorized boundaries of established national park areas." S. Rept. No. 1941, 81st Cong., 2d Sess., p. 160, Cong. Doc. Series No. 11370. The conference report shows that the conferees approved the Senate amendment decreasing the total item "Construction" to $19,667,000. The conferees in terms approved the reduction of $1,000,000 concerning the acquisition of lands at Independence National Historical Park, Pennsylvania. The Senate amendments on the $275,000 and $150,000 sub-items were

[5] The earlier acts, as to land acquisition, had read as follows: "Acquisition of lands: For the acquisition of privately owned lands or interests therein within the authorized boundaries of established areas under the jurisdiction of the National Park Service * * *." Interior Department Appropriation Act, F.Y. 1950, 63 Stat. 765, 793; *id.* 1949, 62 Stat. 1112, 1141.

not mentioned specifically, as they did not involve amending the text of the bill but those adjustments are reflected in the amount actually appropriated. The statement of the managers on the part of the House notes that the action on the $19,667,000 amendment "will necessitate some flexibility to permit adjustment of items originally scheduled under * * * construction." H. Rept. 2991, 81st Cong., 2d Sess., pp. 34, 41, Cong. Doc. Series No. 11384. Under the Senate version, which became law, acquisition of the Kennedy land fits precisely the purpose of "acquisition of privately owned lands within the authorized boundaries of established national park areas."

Further confirmation of the flexible nature of the fund and of the Congressional intentions concerning it may be derived from the Senate hearings. The hearings establish that Congress understood this to be a fund which could be used to purchase land in *any of the national parks.* There is nothing to indicate Congress was otherwise limiting the fund or attaching strings. Mr. Newton B. Drury, Director of the National Park Service, asked the Appropriations Committee in his prepared statement to restore the $275,000 "for general land purchases." He reminded the committee that Congress had for the past several years appropriated money "for the acquisition of privately owned lands located within the boundaries of the areas administered." Such lands constituted "one of the Service's most perplexing problems in the fields of management and protection." Senate Hearings, 195. The same language is used in the National Park Service's budget justification given to the Ap-

propriations Committee, with the statement that "Private holdings are subject to undesirable developments and use over which the Service has no control. * * * The Service cannot correct this condition or carry out its obligation to acquire the lands unless funds are made available for the purpose by the Congress." Senate Hearings, 204. Mr. Drury again referred to the $275,000 item, describing it as "one of the most vital items." Senate Hearings, 223. In the justification which followed, it was pointed out that of the 21,709,000 acres in the entire national park system about 714,000 acres were still in private ownership. It was proposed that the $275,000 item would be used "to acquire most urgently needed land in *various* areas, including * * * [listing some of the parks where land might be acquired]." Senate Hearings, 224. Senator Hayden, presiding at the hearings, had a perfect grasp of the adaptable character of the fund. "You could not say," remarked Senator Hayden, "in advance definitely that you were going to acquire anything at any of these places." Senate Hearings, 230. This statement came just after Mr. Drury had given the Senators a list of possible acquisitions with the $275,000 fund. Then Mr. Drury stated, "Yes, those [listed parks] were given in our justification as examples. This is a flexible fund. Now you asked me about Colonial, and it may well be that there will be purchases there."[6] "Senator Hayden. There may or may not? Mr. Drury. Yes, there may or may not." Senate Hearings, 230. When

[6] This reference was to Colonial National Historical Park which was not on the list of examples.

Senator Cordon asked whether the item "Acquisition of lands and water rights" carried "an itemization of what acquisitions you intended to make," Mr. Drury answered, "Well, except for that $275,000 item, it does." Senate Hearings, 241. In the Appendix hereto, *infra,* pp. 25–28, we print further quotations from the hearings making clear the Congressional intent.

These hearings indicate that this fund was available to purchase land within any national park, mostly on the basis of what might be available at a good price and what had to be purchased to prevent its development or use adverse to the best interests of the park. In the hearings Congress was notified of at least seven instances where the same appropriation had been spent in prior years to acquire land in a national park or monument when there was neither express authority in the act establishing the park or monument nor specific designation of the park in the appropriation used. Two of the instances had not only involved acquisition of land but use of condemnation proceedings as well. See Appendix, *infra,* pp. 26–27. The nature of the appropriation, flexible as it was, made it impossible for Congress to name each park or monument where it might be spent for that determination was left to the Secretary. Nor was it essential that Congress attach to the appropriation an authority to condemn in the process of acquiring the land. As the court said in *Barnidge* v. *United States,* 101 F. 2d 295, 297–298 (C.A. 8, 1939): "* * * As authority had already been conferred to procure real estate for public uses by condemnation, it would seem to have

been quite unnecessary to embody in this Act specific authority to acquire real estate by condemnation proceedings. We must assume that Congress had full knowledge of the Act of August 1, 1888, and of the interpretation that had been placed upon it by the courts."

This history is a complete answer to the theory of the district court. The fact that Congress continued the same appropriation with knowledge of the administrative understanding as to purposes for which the fund could be used, including two specific instances of condemnation, constitutes, we believe, ratification of the administrative construction. Cf. *Brooks* v. *Dewar,* 313 U.S. 354 (1941).[7]

There is further the fact that in this very proceeding a judgment has already been entered on the basis of the appropriation which the district court here did not consider adequate authority for the purchase of land. That judgment awarded 35 acres of land to the United States (R. 23–25). The mere fact that this was a consent judgment does not change the picture, for "no land shall be purchased on account of the United States, except under a law

[7] In recent years, a general policy has been expressed that lands should not be condemned, except in special situations, within national park boundaries without prior consultation with the committee. See H. Rept. No. 314, 83d Cong., 1st Sess., Cong. Doc. Series No. 11665, p. 22; H. Rept. No. 1628, 82d Cong., 2d Sess., Cong. Doc. Series No. 11576, p. 18; Hearings, Subcommittee of Committee on Appropriations, House of Representatives, Interior Department Appropriation Bill for Fiscal Year 1957, p. 243; Hearings, Subcommittee of Committee on Appropriations, United States Senate, Interior Department Appropriation Bill, 1954, pp. 2104–2111.

authorizing such purchase." 41 U.S.C sec. 14.[8] Unless the general appropriations to acquire land anywhere within the national park system were authority to purchase land in the several instances just cited under 41 U.S.C. sec. 14 they were all illegal. Even more ridiculous, Congress would have continued to appropriate money in fiscal year 1951 after having been notified that the National Park Service planned to use the money in such places as Lassen National Park, California, Joshua Tree National Monument, California, Mount Rainier National Park, Washington, Rocky Mountain National Park, Colorado, and Kings Canyon National Park, California, when there was no authority to acquire such land except the appropriation act itself, and that act did not specifically name any of the parks. Clearly, in view of the entire legislative history as shown in the Senate hearings, Congress appropriated the money for this general land acquisition fund to be used to acquire land anywhere within the national park system, regardless of whether there was another statutory authority to acquire in a particular park, and even though Congress did not name specific parks where it thought the money might be spent.

[8] Congress has delegated to the Comptroller General the function of determining whether a particular expenditure is within the authorization of the appropriation.

CONCLUSION

For the foregoing reasons it is submitted that the order of the district court dismissing the complaint of the United States in this condemnation proceeding should be reversed and the case remanded for the determination of just compensation.

Respectfully submitted.

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APPENDIX

There are numerous statements in the Senate hearings about the $275,000 sub-item. Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 81st Cong., 2d Sess., Making Appropriations for the Department of the Interior, pp. 195, 204, 223, 224, 225–231, 241, 1485–1486, 1588. These excerpts are representative of the hearings:

> It is recommended that the entire House reduction of $875,000 for land acquisition be restored. The $275,000 reduction for general land purchases is vitally important. For the past few years, the Congress has provided from $200,000 to $300,000 for the acquisition of privately owned lands located within the boundaries of the areas administered. These owned lands are subject to unsightly commercial development; they stand in the way of ultimate development of the parks and monuments; and they present one of the Service's most perplexing problems in the fields of management and protection. Values of these lands have increased considerably during the past decade because of the enormous increase in public use. They must not be subdivided for summer-home purposes or otherwise developed commercially if the best interests of the Government and the visiting public are to be served (pp. 195–196).
>
> * * * Private holdings are subject to undesirable developments and use over which the Service has no control. * * * The Service cannot correct this condition or carry out its obligation to acquire the lands unless funds are made available for the purpose by the Congress (p. 204).

> * * * The national park system contains a gross area of approximately 21,709,000 acres, of which approximately 714,000 acres are in non-federal ownership. * * * It is proposed to use the $275,000 to acquire most urgently needed land in various areas, including * * * [listing several national parks] (p. 224).
>
> Senator HAYDEN. There is an unidentified item here of "Acquisition of privately owned lands in various areas" of $275,000.
>
> Mr. DRURY. That is right. That is for general purchases. That fund is used to acquire land when it is advantageous for the Government to do so throughout the entire system. * * * We can submit for the record a list of all the lands that have been acquired since that appropriation was made (p. 226).

There follow lists showing the parklands acquired with the general acquisition funds for fiscal years 1948, 1949 and 1950. The lists show the name of each park or monument where land has been acquired, the number of acres acquired in each, and the "contract price." There is a footnote for the several instances where the price is omitted stating, "Settlement price to be determined." There are also under both the 1948 and 1949 tabulations similar statements, as follows:

> Cost of lands acquired by contract, under contract, *condemnation award and estimated condemnation award* is approximately 86 percent of appraised values (pp. 227–228).

For the three years there are listed seven instances where this general acquisition fund has been used to acquire land without there being any authority other than this general fund to acquire such land by pur-

chase or condemnation.[1] The instances referred to are: (1948) Arches National Monument, Glacier Bay National Monument, Chaco Canyon National Monument and Shiloh National Military Park; (1949) Carlsbad Caverns National Park and Prince William Forest Park; (1950) Lassen Volcanic National Park. Although the lists presented to Congress make it clear that the lands acquired with this general fund were obtained both by purchase and condemnation, such lists do not distinguish which tracts were acquired by each method. A check of the Department of Justice and Department of the Interior files confirmed that in at least two of the seven listed instances condemnation proceedings were used: (1948) Chaco Canyon National Monument, *United States* v. *112.98 Acres of Land &c.,* Civil No. 1522, D. of New Mexico (use of condemnation for quieting title); (1949) Carlsbad Caverns National Park, *United States* v. *Elizabeth M. & Ernest E. Scoggin &c.,* Civil No. 1672, D. of New Mexico.

> Senator CORDON. May I inquire whether, in your justification before the House committee your item "acquisition of lands and water rights," where you asked for an increase of from $822,922 in 1950 to $4,827,000 in 1951, carries an itemization of what acquisitions you intended to make with the full amount of the request?
>
> Mr. DRURY. Well, except for that $275,000 item, it does. * * * (p. 241).
>
> Representative LEMKE. * * *
>
> There is another thing that I am interested in, and that is the acquisition of lands generally for the national parks.

[1] While there is authority to condemn land needed to complete national monuments, this authority is limited to instances where the money for such condemnation has been donated, and thus would not be applicable to appropriated funds. 16 U.S.C. sec. 433c.

Restoration of the $275,000 for the general acquisition of privately owned lands within the authorized boundaries of areas in the national park system is urgently needed.

Although the amount requested is small in comparison to the estimated $30,000,000 value of the approximately 550,000 acres of such lands in the system, it, if approved, would allow the National Park Service to continue, in a small way, as it has during the past 3 years to acquire:

(1) Those tracts that stand in the way of development or proper use of the park or monument areas in which they lie;

(2) Those tracts that are in danger of being developed adversely to park standards and principles; and

(3) Those tracts that can now be acquired at bargain prices because the owners are anxious to sell (p. 1485).

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